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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., AND THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH AND DENISE NIEDRICH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 16, 1990

QUESTION PRESENTED

Whether a controlling officer or shareholder may be held personally liable under ERISA for a corporation's delinquent contributions to a multiemployer benefit plan where neither the corporate veil can be pierced nor an alter ego established.

LIST OF PARTIES

All parties to the proceeding in the court of appeals are listed in the caption of this Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Plumbers' Pension Fund, Local 130, U.A., Plumbers' Welfare Fund, Local 130, U.A., and The Trust Fund for Apprentice and Journeyman Education and Training, Local 130, U.A., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on December 19, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 891 F.2d 1297 and is reprinted in the Appendix at 1a, *infra*.

The Memorandum Decision of the United States District Court for the Northern District of Illinois (Duff, D. J.) is reported at 701 F. Supp. 651 and is reprinted in the Appendix at 1c, *infra.*

JURISDICTION

Petitioners brought suit in the United States District Court for the Northern District of Illinois. They invoked federal jurisdiction pursuant to §§ 502(e)(1) and 515 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(e)(1) and 1145, and § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185. On December 5, 1988, the court granted respondents' motion to dismiss the complaint for failure to state a claim upon which relief may be granted (1c).

On December 19, 1989, the court of appeals entered a judgment and an opinion affirming the district court's order (1a). No petition for rehearing was sought.

The time for filing this petition for a writ of certiorari has not been extended.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1145. Delinquent contributions.

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

This proceeding arises out of the dismissal of petitioners' complaint for failure to state a claim upon which relief may be granted.

Petitioners are three multiemployer benefit plans (R.1 at 2). They filed a complaint against respondents, the president and secretary of Rob Roy Plumbing, Inc. (Rob Roy), an Illinois corporation (R.1 at 2, 4, 5). Rob Roy is not a party to this case.

Pursuant to collective bargaining agreements, Rob Roy agreed to make benefit contributions to petitioners (R.1 at 3). When Rob Roy failed to contribute, arbitration was held and petitioners were awarded $24,020.11 (R.1 at 3-4). After Rob Roy failed to pay the award, petitioners brought an action in district court to enforce the award, and on August 12, 1985, judgment was entered against Rob Roy for the amount then due (R.1 at 4). Rob Roy was dissolved by the Illinois Secretary of State prior to satisfying the judgment (R.1 at 4).

On August 12, 1988, petitioners brought this action against respondents individually pursuant to the Employee Retirement Income Security Act (ERISA) to collect the delinquent contributions (R.1). Petitioners' suit was based on § 515 of ERISA, which states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145; (R.1 at 2). Petitioners alleged that each respondent exercised control over Rob Roy in matters pertaining to labor relations and employee benefits and, therefore, each was an "employer" for purposes of liability

under § 515 (R.1 at 4, 5). Petitioners did not allege any facts in support of the piercing the corporate veil or alter ego theories.

Pursuant to respondents' motion, the district court dismissed petitioners' complaint (R.16; 1c). The court recognized that the definition of "employer" under ERISA is broad enough to include individuals (6c-7c). However, it ruled that the word "obligated" in § 515 limited the scope of the definition of "employer" for purposes of determining personal liability (7c-9c). The court held that:

> . . . unless there are grounds to pierce the corporate veil or the corporation is the alter ego of the controlling individual, that individual is not liable under § 1145 [§ 515] unless he or she is a party to the plan or collective bargaining agreement.

(9c)

The court of appeals affirmed this decision (1a). The court heavily relied on its recent decision in *Levit* v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989). In *Levit*, the seventh circuit had recognized that the ERISA definition of "employer" was derived from the virtually identical definition contained in the Fair Labor Standards Act (FLSA), and that under the FLSA, a controlling corporate officer or owner may be held personally liable for the failure to pay the minimum wage. *Id.* at 1193. However, the court below reaffirmed its position in *Levit* that unless an employer is "obligated to make contributions" to a multiemployer plan pursuant to the plan or a collective bargaining agreement, it cannot be personally liable under ERISA absent facts warranting the piercing of the corporate veil or the establishment of an alter ego (7a-8a).

The court also relied on an opinion letter of the general counsel of the Pension Benefit Guaranty Corporation (PBGC) regarding withdrawal liability (8a-9a). The court concluded that an officer or owner could only be held liable

for the contributions if he is liable for general corporate debts under state corporate law (9a, 10a).

REASONS FOR GRANTING THE WRIT

The Decision Below Raises An Important Question Regarding The Funding Of Multiemployer Benefit Plans Under ERISA.

The issue here is fundamental to the success of private multiemployer benefit plans. It has never been presented to this Court. The issue is whether a corporate officer or shareholder who controls decisions regarding contributions to plans may be held personally liable under ERISA for a corporation's delinquencies even though the corporate veil cannot be pierced nor an alter ego established. The lower courts have struggled with this issue, and their opinions reflect a divergence of thought and results. In rejecting personal liability, the seventh circuit misinterpreted ERISA, and by allowing corporate formalities to control over the realities of the workplace, its decision frustrates a central design of ERISA—benefit security through the maintenance and growth of plan funds. If left unchecked, the decision will reduce available benefits to millions of workers and plan beneficiaries. It will force solvent corporate employers to either incur greater *pro rata* costs or withdraw from the plans. It will increase the burden on the PBGC and, ultimately, the taxpayers, to stand behind the broken promises of others. The decision will erode the integrity of the private multiemployer benefit system. Supreme Court review is immediately needed.

A.

Nature and Scope of the Problem

An essential purpose of ERISA is the correction of funding inadequacies in private benefit plans. 29 U.S.C.

§ 1001(a). This correction is crucial to ERISA's ultimate goal, the protection of the interests or workers and their families in promised benefits. 29 U.S.C. § 1001(c); see *Pension Benefit Guaranty Corp.* v. *Gray & Co.*, 467 U.S. 717, 720 (1984).

In the context of multiemployer plans, ERISA's goal has been seriously undermined by delinquencies in employer contributions. This problem has a widespread impact:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers will honor their obligation to contribute in a timely fashion, bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

Senate Comm. on Labor and Human Resources, 96 Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980; Summary and Analysis of Consideration, 43-44 (Comm. Print 1980). In part, Congress enacted the Multiemployer Pension Plan Amendmends Act (MPPAA) to combat this problem. Section 515 of ERISA, added by MPPAA and at issue here, states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the

> terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. To enforce this obligation, MPPAA further amended ERISA by creating a cause of action against the employer for the delinquent contributions and other relief. 29 U.S.C. § 1132(g)(2).

This case raises a basic but important question—in the corporate setting, who is included as an "employer" under § 515. Certainly, a corporation is an employer. This case asks whether corporate decision-makers, individuals who cause the corporation to break promises to contribute to plans, are also employers. It pits corporate formality against workplace reality, with the benefit security of millions at stake. Presently, there are approximately 2,300 multiemployer pension plans nationally which serve about 8,300,000 participants, not counting beneficiaries. PBGC, News Release (May 2, 1989). These figures do not reflect the vast number of multiemployer welfare plans, defined contribution plans, and their additional beneficiaries. Thousands of corporate employers contribute to these plans. The decisions to not properly fund plans are made by their controlling officers or shareholders. This case will touch far more than the parties here, and it will have an enormous impact on the way corporate employers fund multiemployer benefit plans.

B.

The Meaning of § 515

Neither the language of § 515 nor its legislative history expressly states that courts should disregard corporate formalities and impose personal liability on controlling shareholders or officers. However, ERISA mandates that result.

ERISA's definition of "employer," a term used in § 515, is critical to determining the Congressional intent:

> The term "employer" means *any person* acting directly as the employer, *or indirectly in the interest of an employer*, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5) (emphasis applied). ERISA also defines the term "person" as:

> . . . an *individual*, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

29 U.S.C. § 1002(9) (emphasis supplied). These definitions are extremely broad. Even an entity outside the corporate structure such as a management association which administers a corporation's obligations to a multiemployer plan may be deemed an "employer." 29 U.S.C. § 1002(5). A controlling officer or shareholder acting for a corporation regarding multiemployer plan funding just as easily fits within the definition of "employer."

The ERISA definitions of "person" and "employer" are virtually identical to the Fair Labor Standards Act (FLSA) definitions, [29 U.S.C. § 203(a) and (d)]. In fact, ERISA's definition of "employer" is derived from FLSA. *Levit* v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193 (7th Cir. 1989); *Massachusetts Laborers' Health and Welfare Fund* v. *Starrett Paving Corp.*, 845 F.2d 23, 25 (1st Cir. 1988); *Kwatcher* v. *Massachusetts Service Employees' Pension Fund*, 879 F.2d 957, 959-60 (1st Cir. 1989). This Court has long recognized the breadth of the employer-employee relationship under the FLSA. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729 (1947). Like ERISA, neither FLSA's language nor legislative history expressly mandates

the disregard of the corporate form. Yet, relying on the broad definition of "employer", this Court has held that under FLSA, even a management service retained by a building owner may be deemed the employer of the owner's employees. *Falk* v. *Brennan,* 414 U.S. 190, 195 (1974). The circuits have recognized that FLSA is broad enough to impose personal liability on a corporate officer with operational control of a covered enterprise. *Levit* v. *Ingersoll Rand Financial Corp.,* 874 F.2d 1186, 1193 (7th Cir. 1989); *Donovan* v. *Agnew,* 712 F.2d 1509, 1511 (1st Cir. 1983).

Notably, FLSA and ERISA have a similar design—the guarantee of income actually earned by workers. *Massachusetts Laborers' Health and Welfare Fund* v. *Starrett Paving Corp.,* 845 F.2d 23, 25 (1st Cir. 1988); see, 2 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Retirement Income Security Act of 1974, 3374 (remarks of Rep. Madden) (hereinafter Leg. Hist.). Given the substantial identity of the language and purpose of FLSA and ERISA, the statutory interpretation of FLSA is equally applicable to ERISA.

C.

The Substantial Disagreement Among the Courts

The issue here is "difficult". *Massachusetts Laborers' Health and Welfare Fund* v. *Starrett Paving Corp.,* 845 F.2d 23, 27 (1st Cir. 1988). The lower courts have sharply disagreed on it. Recognizing the plain language of ERISA and its strong analogy to FLSA, at least six district courts imposed or recognized the personal liability of controlling officers and shareholders. *Massachusetts State Carpenters Pension Fund* v. *Atlantic Diving Co.,* 635 F. Supp. 9, 12-14 (D. Mass. 1984); *Rubenstein* v. *Tri-State Transport, Inc.,* 646 F. Supp. 1, 2-3 (D. Mass. 1984); *Alman* v. *Servall*

Manufacturing Co., 6 Empl. Ben Cas. (BNA) 2031 (D. Mass. 1984); *Upholsterer's International Union Health and Welfare Fund Trustees* v. *Pontiac Furniture, Inc.*, 647 F. Supp. 1053, 1054-55 (C.D. Ill. 1986); *Gambino* v. *Index Sales Corp.*, 673 F. Supp. 1450, 1452-57 (N.D. Ill. 1987); *Building Trades United Pension Trust Fund* v. *Peters*, [WESTLAW 1987 WL 29330] (E.D. Wis. 1987); *Laborers' Pension Fund* v. *Bakke Construction Co.*, [WESTLAW 1987 WL 19818] (N.D. Ill. 1987); *West Virginia-Ohio Valley Area IBEW Welfare Fund* v. *Ball Electric Co.*, 685 F. Supp. 953, 955 (S.D. W.Va. 1988); *Serembus* v. *Comfort Lines, Inc.*, 689 F. Supp. 1496, 1497-98 (N.D. Ill. 1988); *Glover* v. *Hartmann Freight Lines, Inc.*, [WESTLAW 1988 WL 98808] (N.D. Ill. 1988); *Elam* v. *Seng Truck Leasing Co.*, [WESTLAW 1988 WL 139280] (N.D. Ill. 1988); see also *Rockney* v. *Blohorn*, 877 F.2d 637, 641 (8th Cir. 1989), citing the unpublished decision of the District Court of Minnesota which recognized the personal liability of controlling corporate owners and managers.

The circuits which have considered the issue have rejected personal liability.[1] The circuit decisions reflect a diversity, and even conflict, in reasoning which demonstrates the circuits' struggle with the issue. In *Operating Engineers' Pension Trust* v. *Reed*, 726 F.2d 513, 515 (9th Cir. 1984), the court rejected personal liability without discussing § 515 or the definition of "employer". Arguably, *Reed* does not address the issue. See *Rockney* v. *Blohorn*, 877 F.2d 637,

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[1] A number of district decisions have rejected personal liability. E.g., *Combs* v. *Indyk*, 554 F. Supp. 573, 575 (W.D. Pa. 1982); *Mason Tenders District Counsel Welfare Fund* v. *Dalton*, 648 F. Supp. 1309, 1311-18 (S.D. N.Y. 1986) (vacated at parties' request); *Solomon* v. *Laranne Sportswear Corp.*, 648 F. Supp. 407, 408-09 (E.D. N.Y. 1987); *Solomon* v. *R.E.K. Dress, Inc.*, 670 F. Supp. 96, 98-99 (S.D. N.Y. 1987); *Alman* v. *George Manufacturing Co.*, 680 F. Supp. 56, 57-58 (D. Mass. 1988).

641 (8th Cir. 1989). The third circuit has held that a corporate officer is not a "person" under ERISA and, therefore, cannot be an "employer". *Solomon* v. *Klein,* 770 F.2d 352, 354 (3d Cir. 1985). The first circuit has rejected the third circuit's rationale and has ruled that a controlling officer or shareholder may be an employer under ERISA. *Massachusetts Labors' Health and Welfare Fund* v. *Starrett Paving Corp.,* 845 F.2d 23, 24-25 (1st Cir. 1988); *Kwatcher* v. *Massachusetts Service Employees' Pension Fund,* 879 F.2d 957, 960 (1st Cir. 1989). However, the first circuit has concluded that unless contractually bound, a controlling shareholder or officer is not "obligated" to contribute and, therefore, may not be liable as an "employer" under § 515. *Starrett Paving Corp., supra,* at 25.

The D.C. circuit in *International Brotherhood of Painters* v. *George A. Kracher, Inc.,* 856 F.2d 1546 (1988), ruled that the definitions of "employer" and "person" did not aid in establishing personal liability because a corporate official neither acts directly for an employer nor indirectly in its interests. *Id.* at 1548. Unlike the first circuit, it found significant differences between ERISA and FLSA, and the court found no intent to incorporate FLSA case law into ERISA. *Id.* at 1548-49. The court ruled that in the absence of an express intent to disregard the rule of limited liability, § 515 only imposed liability on the corporate employer. The court was concerned that a contrary rule would discourage employer participation. *Id.* at 1550. In *Scarbrough* v. *Perez,* 870 F.2d 1079 (6th Cir. 1987), the sixth circuit recognized the divergent views of the first circuit and the third and D.C. circuits but did not choose between them.

Shortly before rendering the decision below, the seventh circuit rejected personal liability in *Levit* v. *Ingersoll Rand Financial Corp.,* 874 F.2d 1186 (7th Cir. 1989). The court recognized ERISA's reliance on the FLSA definition of

"employer." *Id.* at 1193. However, it stated that under § 515, only the employer contractually obligated to make contributions by virtue of a plan or collective bargaining agreement may be liable. The court also relied on an opinion letter of PBGC's General Counsel regarding withdrawal liability under Title IV of ERISA. The seventh circuit concluded that an officer may be personally liable only if he is liable for general corporate debts under state corporate law. Shortly after *Levit*, the eighth circuit decided *Rockney* v. *Blohorn*, 877 F.2d 637 (8th Cir. 1989), which essentially followed the D.C. circuit approach.

The decision below is the final case in this line. The seventh circuit simply followed *Levit* without additional analysis.

Even at the circuit level, there has been a recognition of personal liability under ERISA. Although the second circuit has not reached the precise issue presented here, it has held that a controlling officer who defrauds a benefit fund may be held personally liable under ERISA even if the corporate veil cannot be pierced. *Leddy* v. *Standard Drywall, Inc.*, 875 F.2d 383, 388 (2d Cir. 1989). It stated that a contrary ruling would defeat ERISA's purposes of promoting plans and protecting contractually defined benefits. *Id.* Additionally, in *Rockney* v. *Blohorn*, 877 F.2d 637 (8th Cir. 1989), the dissent reasoned that the rejection of personal liability for a controlling officer or owner is inconsistent with ERISA's purpose. *Id.* at 644 n. 1 (Heaney, S. J., dissenting).

The circuits have amply expounded their views. Their inconsistent reasoning illustrates their confusion, and district courts not bound by circuit decisions have recognized individual liability. This divergence demonstrates the need for Supreme Court review.

D.

The Decision Below Frustrates ERISA's Purpose.

In rejecting personal liability, the seventh circuit focused on § 515's language, "obligated to make contributions" to a multiemployer plan. The court reasoned that only a party to a plan or collective bargaining agreement is obligated to make the contributions and, therefore, a controlling officer or shareholder may not be held liable. The court misconstrued both the design and purpose of ERISA.

The phrase "obligated to make contributions" must be viewed in its proper context. Through MPPAA generally, and § 515 specifically, Congress sought to resolve the problems of delinquent contributions to *multiemployer* plans. E.g., Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43, 44 (Comm. Print 1980). MPPAA did not concern single-employer plans. On the other hand, since its inception, ERISA has covered both single and multiemployer plans. Since MPPAA is an amendments act incorporated into the broader ERISA statute, Congress needed to limit MPPAA's language to multiemployer plans. To properly limit the focus of § 515, Congress inserted the entire phrase, "who is obligated to make contributions to a *multiemployer plan* under the terms of the plan or under the terms of a collectively bargained agreement . . ." 29 U.S.C. § 1145 (emphasis added). The phrase was not designed to limit applicable employers—only applicable benefit plans.

Moreover, the court's reliance on the phrase, "obligated to make contributions" misses the workplace reality which ERISA itself recognizes. A corporation is not self-effectuating. It cannot meet its contractual obligations to plans or other creditors without the active involvement of its manag-

ers. Certainly, in directing payment to a multiemployer plan, a corporate agent acts "indirectly in the interest of [the] employer" in relation to the plan. 29 U.S.C. § 1002(5). By the same token, when an officer diverts available contributions to other creditors or himself, or allows employees to work when the corporation cannot make contributions, the officer also acts "indirectly in the interest of [the] employer" in relation to the plan. 29 U.S.C. § 1002(5). Through ERISA's definition, for purposes of enforcing contractual plan obligations so vital to the maintenance and growth of plans, both the corporation and its controlling personnel are the "employer".

Properly understood, § 515 merely requires that the obligation to contribute must arise out of a contract. See *Laborers' Health and Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 550 n. 16 (1988) [Section 515 "provides only for a contractual *origin* for delinquency liability" (emphasis supplied)]. However, once the obligation arises, the employer, as broadly defined by ERISA, must make the required contributions or be liable for a breach. Critically, in enacting MPPAA, Congress did not change the definition of "employer" in any way. 126 Cong. Rec. 23,287 (1980) (remarks of Sen. Williams). Unfortunately, by excluding controlling corporate officers or shareholders from § 515's reach, the decision below frustrates the Congressional intent to achieve full contractual compliance.

This Court has recognized that the formalities of corporate ownership may not be employed to defeat legislative policies. *First National City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629-30 (1983). This rule has been applied in ERISA cases. *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-21 (2d Cir. 1987); *Alman* v. *Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986).

ERISA is not a corporate law statute. It is pension reform legislation designed to protect benefits for eligible participants and dependents. The attainment of ERISA's goal of benefit security depends upon plan solvency and growth, which requires full and timely contributions. 126 Cong. Rec. 11,991 (1980) (remarks of Rep. Thompson); 126 Cong. Rec. 20,178 (1980) (remarks of Sen. Javits). Congress recognized that corporate promises are often made and broken by controlling owners or managers who effectively personify the corporation. ERISA manifests the national will that those individuals may not defeat vested employee rights by raising, even in good faith, the cloak of limited liability. Contrary to ERISA's purpose, the decision below allows employers to take risks at the expense of employee security.

The notion that the decision fosters ERISA's purpose by encouraging employer participation is incorrect. Plan participation is encouraged only as a means of ensuring plan maintenance and growth:

> The act is designed to foster plan continuation and growth *because plan continuation and growth provides participants and beneficiaries the greatest security against benefit loss.*

126 Cong. Rec. 11,991 (1980) (remarks of Rep. Thompson); see also 126 Cong. Rec. 20,178 (1980) (remarks of Sen. Javits). In tough times, officers and owners shielded from personal liability have no incentive to honor corporate obligations to contribute. The decision encourages plan participation at the expense of plan solvency, which jeopardizes employee security and subverts ERISA's goals.

In relying on the PBGC opinion letter, the seventh circuit again confused the design of ERISA. The letter only concerns withdrawal liability under Title IV of ERISA. (Id, *infra.*) It did not concern delinquency liability under Title I. Withdrawal and delinquency liability present separate con-

cerns requiring separate treatment. See *Laborers' Health and Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545-46 (1988). Moreover, since the PBGC only enforces Title IV, its opinion is not entitled to deference here. 29 U.S.C. § 1303(e); *Trustees of Iron Workers' Local 473 Pension Trust* v. *Allied Products Corp.*, 872 F.2d 208, 210 n. 2 (7th Cir. 1989).

Through the letter, the court incorrectly bound determinations of personal liability under § 515 into considerations of state law. Section 515 creates a federal obligation enforceable through a federal cause of action. Sen. Comm. on Labor and Human Resources, 96 Cong. 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980); 29 U.S.C. § 1132(g)(2). The decision suffocates important employee rights under the blanket of state law when, instead, the court should have developed federal common law to breathe life into the Congressional intent. See *Firestone Tire and Rubber Co.* v. *Bruch*, — U.S. — , 109 S.Ct. 948, 954 (1989).

E.

The Consequences of the Decision Below

The decision has an intolerable impact on the private multiemployer system. Plan participants and beneficiaries feel the sting of the delinquencies through lower benefits, and at a time when they can least afford it—during retirement or disability. Moreover, because benefits are not gratuities but are deferred compensation, employees have often foregone wage increases based upon the promise of benefits. 2 Leg. Hist. 1605 (remarks of Sen. Williams); 3 Leg. Hist. 3590 (remarks of Rep. Drinan). Misled workers, who learn

much too late of delinquencies, have no chance to protect themselves and their dependants.

Without the leverage of individual liability provided by ERISA, plans must incur additional costs to discover and obtain the assets of marginal or bankrupt corporations. These additional costs will further deplete available benefits.

The decision below will not comfort those employers who have faithfully honored their contribution obligations. They must bear increased contribution loads to compensate for the delinquencies and added collection costs. Faced with excessive plan contributions, employers may withdraw, which will further weaken and even destroy plans.

If pension plans cannot survive, the onus will fall on the PBGC to guarantee benefits. If losses are excessive, a taxpayer bailout may be needed. Participants and beneficiaries of welfare plans, which do not have PBGC backing, will not be so lucky. In the long run, the erosion of the private multiemployer plan system will force greater reliance on the already overworked Social Security system.

ERISA manifests the high priority which Congress has given to the private multiemployer benefit system. Full and timely contributions are the system's blood. By imposing personal liability, ERISA helps ensure its health. By rejecting liability, the decision below threatens the integrity of plans benefiting workers and their families, many of whom have already been forced to accept reduced benefits. The issue is of national concern and far too important to await the development of a true conflict among circuits. Immediate plenary review is needed.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-1015

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Plaintiffs-Appellants,

THE PLUMBING COUNCIL OF CHICAGOLAND, PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY,

Plaintiffs,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88-C-6996—**Brian Barnett Duff**, *Judge.*

ARGUED SEPTEMBER 26, 1989—DECIDED DECEMBER 19, 1989

Before COFFEY and EASTERBROOK, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Plaintiffs-appellants, Plumbers' Pension Fund, Local 130, U.A., Plumbers' Welfare Fund, Local 130, U.A., and the Trust Fund for Apprentice and Journeyman Education and Training, Local 130, U.A.

(hereinafter "Funds") appeal from the district court's dismissal of their complaint that sought to obtain from the defendants-appellees, Robert Niedrich and Denise Niedrich, president and secretary, respectively, of Rob Roy Plumbing, Inc. ("Rob Roy") delinquent contributions owed to the Funds under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*[1] We affirm.

I.

Because this case arises on a motion to dismiss, our review is confined to the limited facts set forth in the Funds' complaint. The Funds' complaint alleges that Rob Roy Plumbing, Inc., ("Rob Roy") and the Chicago Journeyman Plumbers' Local Union 130, U.A. ("Union") entered into a collective bargaining agreement effective January 1, 1976 and terminating on December 31, 1983. Under the terms of this agreement the plumbing firm (Rob Roy) was obligated to make periodic contributions to the plaintiff Funds. The complaint alleges that Robert Niedrich and Denise Niedrich, respectively the former president and secretary of Rob Roy, "exercised control over and acted on behalf of Rob Roy in matters pertaining to employee relations, including employee benefits." The complaint further alleges that when Rob Roy failed to make contributions to the plaintiff Funds, the Union and the Funds requested and were granted arbitration pursuant to the agreement.

A joint arbitration board established under the agreement awarded the plaintiff Funds, the Plumbing Council of Chicagoland and the Plumbing Contractors Association

[1] The Plumbing Council of Chicagoland and the Plumbing Contractors Association of Chicago and Cook County were also plaintiffs in the district court. However, these two plaintiffs have chosen not to appeal the district court's decision.

of Chicago and Cook County $25,066.78.[2] Rob Roy failed to pay the amount designated in the arbitration award and the plaintiff Funds, together with the Plumbing Council of Chicagoland and the Plumbing Contractors Association of Chicago and Cook County filed a complaint against Rob Roy requesting enforcement of the arbitration award.[3] On August 12, 1985, judgment was entered, pursuant to the complaint, against Rob Roy Plumbing, Inc. in the amount of $23,020.90.[4] Rob Roy failed to satisfy the judgment and the Illinois Secretary of State dissolved the plumbing firm on May 1, 1986.

On August 12, 1988, the plaintiff Funds, the Plumbing Council and the Plumbing Contractors Association filed this action individually against Robert and Denise Niedrich, respectively the former president and secretary of Rob Roy. The complaint alleged that the Niedrichs were personally liable for the delinquent contributions to the plaintiffs under ERISA and sought from each defendant $23,020.92 together with interest and attorneys' fees. The complaint alleged that the Niedrichs had violated 29 U.S.C. § 1145[5] because their exercise of control over and

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[2] This amount was divided among the various parties as follows: Plumbers' Pension Fund - $10,491.76, Plumbers' Welfare Fund - $12,576.01 (including 5 percent late payment charge), Trust Fund for Apprentice and Journeyman Education and Training - $952.34, Plumbing Council of Chicagoland - $735.46, and Plumbing Contractors Association of Chicago and Cook County - $311.21.

[3] The complaint does not state the court in which this complaint was filed. The Plumbing Council of Chicago and the Plumbing Contractors Association of Chicago and Cook County were also parties to the state court lawsuit.

[4] The complaint does not explain the discrepancy between the $23,020.90 amount the court awarded and the $25,066.78 amount the arbitration board had awarded.

[5] 29 U.S.C. § 1145 reads:

"Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under

(Footnote continued on following page)

actions on behalf of Rob Roy "in matters pertaining to employee relations, including employee benefits" meant that they were "employers" within the meaning of 29 U.S.C. § 1002(5)[6] and, thus, personally liable for Rob Roy's delinquent contributions. The district court held that the complaint did not allege facts sufficient to establish that Rob Roy's corporate veil should be pierced.[7] In their brief before this court, plaintiffs-appellants concede that neither of these factors is present.

The Niedrichs moved to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that under ERISA they could neither be classified as "employers" nor as parties who had unilaterally and contractually agreed to make contributions to the plaintiffs. In view of the fact that the defendants were parties to neither the plan nor the collective bargaining agreement, the district court held that "unless there are grounds to pierce the corporate veil or the corporation is the alter ego of the controlling individual, that individual is not liable under § 1145 unless he or she is

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[5] *continued*

the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

[6] 29 U.S.C. § 1002(5) reads:

"For purposes of this subchapter:

* * *

(5) The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

[7] *Plumbers' Pension Fund, Local 130, U.A. v. Niedrich*, 701 F. Supp. 651, 655 (N.D. Ill. 1988). Although the district court did not explicitly conclude that the complaint failed to allege that Rob Roy was an "alter ego" of either defendant, it is clear from the court's dismissal of the Funds' ERISA claim that it concluded that Rob Roy was not the "alter ego" of either defendant.

a party to the plan or collective bargaining agreement." *Plumbers' Pension Fund, Local 130, U.A. v. Niedrich*, 701 F. Supp. 651, 655 (N.D. Ill. 1988). Because the plaintiffs had not alleged that the Niedrichs were parties to the plan or to the collective bargaining agreement, that Rob Roy's corporate veil warranted piercing or that Rob Roy was the Niedrichs' alter ego, the district court dismissed the complaint. The plaintiff Funds appeal from the district court's ERISA decision.[8]

II.

The Funds' action against the Niedrichs under ERISA was dismissed for failure to state a claim upon which relief may be granted.

> "We review such a dismissal *de novo*. The well-pleaded factual allegations of the complaint and all reasonable inferences which follow from the allegations must be taken as true. A complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

Corcoran v. Chicago Park District, 875 F.2d 609, 611 (7th Cir. 1989) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (citation omitted).

On numerous occasions in similar factual situations courts of appeals have had the opportunity to address the question of whether individuals acting as corporate officers or shareholders can be held personally liable for a corporation's ERISA obligations. These courts have unanimous-

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[8] The district court also determined that it lacked jurisdiction over the plaintiffs' action against the Niedrichs under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), on the basis of this court's decision in *Loss v. Blankenship*, 673 F.2d 942, 946-48 (7th Cir. 1982), that "affirmed the general principle that persons who are not parties to a collective bargaining agreement cannot be sued under the LMRA." *Niedrich*, 701 F. Supp. at 655. Plaintiff Funds do not appeal from this holding.

ly held, as the court held in this case, that unless the corporation is acting for and an alter ego of the individual or there exist facts that warrant piercing the corporate veil, the individual will not be held liable for the corporation's obligations under ERISA. *See Rockney v. Blohorn*, 877 F.2d 637, 639-43 (8th Cir. 1989) ("[C]orporate officers cannot be held personally liable under ERISA where there is no basis for piercing the corporate veil"); *Scarbrough v. Perez*, 870 F.2d 1079, 1082-85 (6th Cir. 1989) (Unless facts warrant piercing the corporate veil separating the corporate employer from its owner-chief executive, the owner-executive will not be held liable for the corporation's delinquent pension contributions); *International Brotherhood of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1547-50 (D.C. Cir. 1988) (Corporation's chief officer and principal shareholder is not liable for corporation's delinquent contributions in the absence of allegations that he personally was a party to the plan or collective bargaining agreement and where there are no allegations that the corporation was an alter ego or of conduct that would require piercing the corporate veil); *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24-26 (1st Cir. 1988) (Corporation's president and sole shareholder is not liable for corporation's delinquent pension contributions unless it can be established that he was acting other than as a company officer and had, thus, personally contractually obligated himself to guarantee pension contributions); *Solomon v. Klein*, 770 F.2d 352, 353-55 (3rd Cir. 1985) (In the absence of allegations of alter ego status or that warrant piercing the corporate veil, or of a contractual obligation, president of corporation who was also fifty percent stockholder was not personally liable for delinquent contributions to a retirement fund); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 515 (9th Cir. 1984) (Kennedy, J.) ("An owner of a corporation will be held personally liable for trust fund contributions if (1) there is little or no respect shown to the separate identity of the corporation; (2) recognition of the corporation as a separate en-

tity would result in injustice to the litigants; and (3) there was a fraudulent intent behind the incorporation").

In *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1192-94 (7th Cir. 1989); we noted our general agreement with the rationale of these cases. *Levit* was a bankruptcy case that did not approach the issue of a corporate officer's liability for pension contributions in the usual context of a pension fund's attempt to recover delinquent contributions from a corporate officer.[9] Nonetheless, we were required to determine whether a corporate officer could be held personally liable for a corporation's pension contributions in the absence of a contract personally binding him to these obligations. In resolving this question we turned to Section 515 of ERISA, 29 U.S.C. § 1145 that requires "[e]very employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement [to] make such contributions in accordance with the terms and conditions of such plan or such agreement." We stated that under Section 515:

> "Only 'an employer *who is obligated to make contributions* to' a plan under an agreement need do so. Such an employer must make contributions 'in accordance with the terms and conditions of such plan or such agreement.' Even if a manager or other officer is an 'employer' under § 3(5) [of ERISA], the plan or other agreement still governs what each must

[9] *Levit* arose in the context of a bankruptcy trustee's attempts to recover funds a bankrupt corporation had paid to a pension fund. The trustee attempted to establish that the bankrupt corporation's "insiders" were potentially liable for the corporation's pension contributions, meaning that payments to the pension funds reduced the insider's exposure to liability. The trustee also attempted to demonstrate the related fact that the insiders were "creditors" as they would "hold contingent claims against the debtor if [the insiders] should be called on to satisfy [the corporation's] debts to the pension and welfare funds . . . ." *Levit*, 874 F.2d at 1192.

> do, for not all 'employers' are 'obligated to make contributions' under the 'terms and conditions' of a plan or agreement. [*Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc)] holds that these documents will be strictly enforced. Exactitude works both ways. Just as pension and welfare funds get no less than the agreements provide, so they get no more. . . . Several plans obtained Richard Deprizio's [the corporate officer] personal commitment, as co-maker of notes with Deprizio Co. Other plans had only Deprizio Co.'s commitment to pay. Section 515 requires us to honor the difference between these engagements."

Levit, 874 F.2d at 1193 (emphasis in original). As well as emphasizing the language of Section 515 of ERISA, we relied upon an opinion letter of the General Counsel of the Pension Benefit Guaranty Corp., the agency that insures multi-employer pension funds, that stated that " 'ERISA has no special rules regarding shareholder-officer liability. Accordingly, this issue is usually determined by state law, which generally provides that shareholders are not liable for the debts of a corporation.' " *Levit*, 874 F.2d at 1193 (quoting General Counsel of the Pension Benefit Guaranty Corp., Opinion Letter 82-38 (December 14, 1982)). We further noted the precedent of other courts stating:

> "Courts routinely rebuff efforts to collect pension debts from managers and investors unless the officer or investor would be liable for the firm's other debts under state law—in other words, unless courts would 'pierce the corporate veil' in light of the structure and operation of the particular firm."

Levit, 874 F.2d at 1193. In light of the administrative interpretation of ERISA and the controlling case law we concluded:

> "It would take a compelling argument to persuade us to depart from an interpretation of the law adopted by a responsible agency and followed by so many courts. Inferences from the importation into

> ERISA of a few words from the [Fair Labor Standards Act] do not satisfy that standard.
>
> An officer who does not make a contractual commitment to a pension or welfare plan still could be personally liable, to the extent he is liable for general corporate debts under state corporate law. But when state law recognizes a separate identity of manager and firm, liability under ERISA depends on the contents of the plan and related agreements."

Levit, 874 F.2d at 1194 (citation and footnote omitted).

We see no reason to alter, much less overturn, our decision in *Levit* concerning personal liability under ERISA and we apply *Levit*'s analysis here. It is undisputed that the Niedrichs were neither parties to the Pension Plan nor the collective bargaining agreement that obligated the firm Rob Roy Plumbing, Inc. to contribute to the Pension Plan. Thus, the Niedrichs were not personally obligated to make contributions to the Pension Plan. Furthermore, there is no allegation that Rob Roy was an alter ego of the Niedrichs or of facts sufficient to warrant piercing Rob Roy's corporate veil. Accordingly, the *Levit* analysis mandates dismissal of the complaint for failure to state a claim upon which relief may be granted.

The plaintiff Funds contend that their complaint states a claim upon which relief may be granted, even under *Levit*, as Illinois state law would require a conclusion that the Niedrichs were personally liable for Rob Roy's delinquent pension contributions. The plaintiff Funds cite the language in Section 13 of the Illinois Wage Payment and Collection Act, Ill. Ann. Stat. ch. 48, ¶ 39m-13 (Smith-Hurd 1986), that states "any officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be the employers of the employees of the corporation." The basic difficulty with the Funds' position is that, in the context of pension contributions, the Illinois Wage Payment and Collection Act is expressly preempted by ERISA. *See Arnold v. Babcock and Wilcox Co.*, 123 Ill.

2d 67, 525 N.E.2d 59, 62-63 (1988). Although the Funds acknowledge that ERISA preempts a cause of action under the Illinois Wage Payment and Collection Act, they assert that Section 13 of that Act is nevertheless applicable to this case because of *Levit*'s holding that the personal liability of officers is to be determined under "state corporate law." *Levit*, 874 F.2d at 1194. We disagree with the plaintiffs' contention. Although *Levit* establishes that "[a]n officer who does not make a contractual commitment to a pension or welfare plan still could be personally liable, to the extent he is liable for general corporate debts under state corporate law," *id.* at 1194, we are not of the opinion that Section 13 of the Illinois Wage Payment and Collection Act provides an appropriate basis for establishing this liability under state law. By its very words this section proscribes and limits actions under the Illinois Wage Payment and Collection Act, a law that cannot be applied to pension contributions as a result of ERISA's preemptive scope.[10] Since the plaintiffs-appellants Funds fail to cite any of the Illinois statutory or case law that would render the Niedrichs personally liable for Rob Roy's delinquent pension contributions in this case, we hold that Illinois state law does not provide a ground for the Funds' cause of action that could prevent the dismissal of the Funds' complaint.

Corporate officers who are not parties to a pension plan or a collective bargaining agreement requiring contributions to a pension plan are personally liable for pension contributions only to the extent they are liable for general corporate debts under state corporate law. Because the complaint fails to allege facts demonstrating that Rob Roy

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[10] Section 13 of the Illinois Wage Payment and Collection Act, Ill. Ann. Stat. ch. 48, ¶ 39m-13 (Smith-Hurd 1986) provides:

> "Any officers of a corporation or agents of an employer who knowingly permit such employer to violate *the provisions of this Act* shall be deemed to be the employers of the employees of the corporation."

(Emphasis added).

was the Niedrichs' alter ego, that Rob Roy's corporate veil should be pierced, a personal contractual guarantee to pay pension contributions or any other basis for establishing the Niedrichs' personal liability under state law, we hold that the district court action dismissing the plaintiff Funds' complaint was proper. The decision of the district court is

AFFIRMED.

A true Copy:

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JUDGMENT — ORAL ARGUMENT
United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

DECEMBER 19, 1989.

BEFORE
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. JESSE E. ESCHBACH, Sr. Circuit Judge

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130 U.A., TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION & TRAINING, LOCAL 130, U.A., PLUMBING COUNCIL OF CHICAGOLAND and PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO & COOK COUNTY,

Plaintiffs-Appellants,

vs.

No. 89-1015
ROBERT NIEDRICH and DENISE NIEDRICH,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 88 C 6996
Brian Barnett Duff, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PLUMBERS' PENSION FUND, LOCAL 130, U.A.; PLUMBERS' WELFARE FUND, LOCAL 130, U.A.; THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.; THE PLUMBING COUNCIL OF CHICAGOLAND; PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY,

Plaintiffs,

v.

ROBERT NIEDRICH, and DENISE NIEDRICH,

Defendants.

No. 88 C 6996

MEMORANDUM OPINION

Rob Roy Plumbing, Inc. was a plumbing contractor whose principal place of business was Cook County, Illinois. From January 1, 1976 through December 31, 1983, Rob Roy had collective bargaining agreements with the Chicago Journeymen Plumbers' Local Union 130, U.A. Under these agreements, Rob Roy promised to pay various funds—the plaintiffs in this case—various amounts, at stated contribution rates. See Complaint, Exhibits A-B. Article III of each collective bargaining agreement required the parties to submit all disagreements or disputes between them to a Joint Arbitration Board ("JAB"). See *id.*, Exhibit C. One such disagreement arose over the amount Rob Roy owed the funds. Pursuant to their contract, the parties submitted this dispute to the JAB, which determined that Rob Roy owed the plaintiffs $25,066.78. The plaintiffs demanded payment,

but Rob Roy refused to pay. The plaintiffs went to court and obtained a judgment for $23,020.90, but Rob Roy still did not pay.

The plaintiffs then learned, nearly a year later, that Rob Roy went out of business. In fact, the Illinois Secretary of State went so far as to dissolve Rob Roy on May 1, 1986. Naturally the plaintiffs were disappointed, and sought someone to pay Rob Roy's bills. They think they have found such persons in Robert and Denise Niedrich, the former president and secretary of Rob Roy. The plaintiffs filed suit against the Niedrichs in this court on August 12, 1988.

The plaintiffs seek recovery under two theories, one statutory, the other, contractual. The basis for their first claim is 29 U.S.C. § 1145 (1982), which is part of the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. §§ 1001 et seq. Section 1145 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The plantiffs base their contractual claim on the collective bargaining agreements themselves. The plaintiffs submit that this court has jurisdiction over suits for violations of these agreements under § 301 of the Labor Management Relations Act of 1947 ("LMRA"), codified at 29 U.S.C. § 185.

The Niedrichs have moved to dismiss both claims. Their principal argument with respect to each count is that they are not obligated to pay Rob Roy's liabilities—Rob Roy is. The Niedrichs' arguments are subtly different in each instance, since § 1145 actually defines the liability of an entity under ERISA, while § 301 determines the extent of this

court's jurisdiction over a particular type of dispute. In order to decide whether the Niedrichs are correct, this court must interpret each statute, and weigh the Niedrichs' arguments in light of this court's interpretations.

The court begins with §1145. This court will use the same method of interpretation employed in *Bastian* v. *Petren Resources Corp.*, 1988 U.S.Dist. LEXIS 12372. This court thus starts its analysis with the plain words of § 1145. Neither party disputes that the plaintiffs are multiemployer plans as that term is used in § 1145. They dispute the meaning of other words in § 1145, however—words which reflect ambiguities. While § 1145 appears to hold only the parties who so obligate themselves under a contract liable for multiemployer plan contributions—in this case, Rob Roy—ERISA defines "employer" as used in § 1145 as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). The plaintiffs suggest that this definition widens the scope of liability under § 1145 beyond the person who actually obligated himself under the collective bargaining agreement. While Judge Grady ruled in *Laborers' Pension Fund* v. *Bakke Construction Co.*, 1987 U.S.Dist. LEXIS 10509, 14, that the definition of "employer" "plain[ly]" made corporate officers liable under ERISA, Judge Grady did not reconcile the definition of "employer" with the obligation language of § 1145. Rather than recognizing a plain priority of the word "employer" over the word "obligated" in § 1145, this court finds a plain conflict between the terms.

This court thus must rely on other methods of interpreting § 1145. The context of the words "employer" and "obligated" provides a little help, as the language of § 1145 repeatedly stresses its purpose: making the contractual obli-

gations of employers to multiemployer plans enforceable as a matter of federal law. Section 1145 emphasizes contracts no fewer than four times, in addition to its use of the word "obligated." It seems strange that in making contracts for plan contributions a matter of federal law, Congress would have gone beyond the law of contracts and held persons who are not parties to the contract—constructive or otherwise—liable for contractual obligations. Still, this court cannot ignore ERISA's broad definition of "employer." Given the Congress's desire to provide "minimum standards . . . assuring the equitable character . . . and . . . financial soundness" of benefit plans through ERISA, see 29 U.S.C. § 1001(a), it is not inconceivable that Congress would have expanded the traditional scope of contractual obligations. See *Gambino* v. *Index Sales Corp.*, 673 F.Supp. 1450, 1454-55 (N.D. Ill. 1987) (Shadur, J.) (while not justifying expansion beyond ERISA's terms, the social purposes of the Act support broad liability under § 1145 when other indicators of legislative intent point in the same direction).

In *Bastian*, when this court exhausted the methods of interpreting a statute such as the plan meanings of the words themselves, their context, and the reasonableness of the contending interpretations, this court turned to the legislative history. The court will proceed no differently in this case. Fortunately, unlike in *Bastian*, several courts have had the opportunity to examine the legislative history of the statute in dispute here. Unfortunately, these courts are in conflict.

This court will begin with the historical analyses of § 1145 undertaken by those courts which sit in this district. Judge Shadur presented the first and most exhaustive of these analyses in *Gambino*. In that case, the trustees of a multiemployer pension trust sued the Index Sales Corporation, as well as Index's president, director, and sole shareholder,

Donald Keenan. As a signatory to the collective bargaining agreement that required contributions to the pension trust, Index admitted its liability. Keenan disputed his own, and so Judge Shadur had to decide the very issue posed here. The evidence revealed that there was no factual basis for piercing Index's "corporate veil" under Illinois law. Nevertheless, Keenan was Index's Chief Operating Officer, and he directed all of the company's labor relations, its corporate operations, and its financial transactions—including all matters relating to payments to the pension trust. *Gambino*, 673 F.Supp. at 1451-52.

Judge Shadur first canvassed earlier decisions that had considered the question of individual liability for corporate obligations to multiemployer plans. He noted that district courts in the First Circuit had "consistently held such personal liability existed," and that Judge Warren of the Eastern District of Wisconsin had followed the lead of these courts. Judge Shadur then summarized the various appellate interpretations of § 1145, suggesting that the First Circuit had "pointed the way" toward control-person liability in *Donovan* v. *Agnew*, 712 F.2d 1509 (1st Cir. 1983), but noting that the Third and Ninth Circuits had ruled to the contrary except in cases where a court could pierce the corporate veil. *Gambino*, 673 F.Supp. at 1452-53 & n.4.

Before this court traces Judge Shadur's opinion further, it should be noted that since *Gambino*, the First Circuit reversed the line of district court decisions on which Judge Shadur relied and distinguished *Agnew* in cases involving control-person liability under § 1145. See *Mass. Laborers' Health & Wel. F.* v. *Starrett Paving*, 845 F.2d 23, 26 (1st Cir. 1988). Similarly, the D.C. Circuit has joined the First, Third, and Ninth Circuits in holding that controlling persons are not liable under § 1145, absent a claim that the corporation is the person's alter ego or that it is prudent to pierce

the corporate veil. See *Intern. Broth. of Painters* v. *George A. Kracher*, 856 F.2d 1546 (D.C. Cir. 1988). Thus, whatever power Judge Shadur's opinion has must derive from the force of his reasoning, and not from its foundation in precedent.

Having examined the precedents, Judge Shadur addressed the very question posed here: the extent to which the word "obligated" in § 1145 narrows the broad definition of "employer" in § 1002(5). Judge Shadur held that § 1145 could not limit § 1002(5) to those persons who signed the contract. He reasoned that such a reading "would allow no room at all for the Section 1002(5) definition of 'employer' to include persons 'acting indirectly . . . in the interest of the employer,' " nor would it allow for piercing of the corporate veil. Judge Shadur's fear was that if § 1145 limited § 1002(5), it would render § 1002(5) "a nullity." Presuming that Congress did not speak to the issue "in a wholly idle manner," Judge Shadur held that there had to be some room for personal liability for corporate obligations under § 1145. *Gambino*, 673 F.Supp. at 1453-54.

It was thus Judge Shadur's task to determine where personal liability began and ended. To aid him in this task, the Judge turned to the Fair Labor Standards Act ("FLSA"), codified at 29 U.S.C. § 201 et seq., which contains many provisions that are identical to those in ERISA. Judge Shadur considered the Supreme Court's decision in *Falk* v. *Brennan*, 414 U.S. 190, 195 (1974), which interpreted FLSA's nearly parallel definition of "employer" and held that a person who had "substantial control of the terms and conditions of the work" of employees was liable for violations of FLSA, even if that person was not the nominal employer. Judge Shadur then noted that the "uniform judicial reading" of FLSA's definition of "employer", both before and after *Falk* and ERISA,

> has been that such a broad-sweep definition was intended to strip away that insulation where the corporation-controlling individual has opted to prefer the payment of other corporate debts to the payment of obligations running to corporate employees and given special statutory recognition by Congress.

The Judge then concluded that as the courts had "implemented that intention under FLSA, . . . they should do no less than under ERISA's substantively identical provisions." *Gambino*, 673 F.Supp. at 1454-55 (footnote omitted).

Judge Shadur felt that his conclusion was superior to that reached by the Third and Ninth Circuits because they had not considered the parallel definition of "employer" in FLSA. He reasoned that, were their interpretations of § 1145 to prevail, a court would be compelled to overrule the entire line of FLSA cases that weighed in favor of control-person liability. *Id.* at 1455-56 & n.12. Judge Shadur was correct in this observation, as both the Third and Ninth Circuits had reached their result by limiting ERISA's definition of "employer" in § 1002(5), and not by relying on the "obligated" language of § 1145. See *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981); *Solomon* v. *Klein*, 770 F.2d 352, 353-54 (3d Cir. 1985).

Were this case solely about § 1002(5), Judge Shadur's logic would be unassailable: it would be folly to interpret identical language in FLSA and ERISA differently for each statute, absent a clear indication from the context or history of the two provisions. But this is not a case of identical provisions, as ERISA's § 1145 has no counterpart in FLSA. While this court agrees with Judge Shadur that, in using the expansive term "employer" in § 1145, Congress did not limit liability under § 1145 only to signatories of plan and collective bargaining agreements, this court cannot accept the Judge's determination that FLSA's definition of employer determines liability under ERISA's § 1145. Rather, if a

court must refer to the legislative history of a statute to determine its meaning, it should start with the history of the provision itself, and not the history or meaning of other statutes.

This court thus turns to the legislative history of § 1145, which the First Circuit canvassed in *Starrett*. There the court noted that Congress wished to impose a federal statutory duty only on those employers "'that are *already contractually obligated* to make contributions to multiemployer plans.'" *Starrett*, 845 F.2d at 25, quoting The Multiemployer Pension Plan Amendments Act of 1980, S. 1076, Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980) (emphasis added). The *Starrett* court also noted that its view of the primacy of contractual obligations in § 1145 was consistent with the Supreme Court's position in *Laborers' Health & Welfare Tr.* v. *Adv. Light Con.*, 108 S.Ct. 830, 835-36 (1988), that Congress enacted § 1145 to provide employers with incentives to honor their contracts. *Starrett*, 845 F.2d at 25.

The *Starrett* court also addressed Judge Shadur's concern in *Gambino* that emphasizing contracts in § 1145 would render § 1002(5) a nullity, or at least prevent a court from piercing the corporate veil in § 1145 cases. The court noted first that, while its holding did limit the effect of § 1002(5) in § 1145 cases, "the expanded definition could still make a different elsewhere in [ERISA]." This observation allowed the *Starrett* court to strike the proper balance between the enactment of § 1145—a provision that has no parallel in FLSA—and Judge Shadur's reasoning that, where Congress has copied language from one statute to another, the courts should interpret the language consistently in each. The court reasoned that the broad definition of "employer" in § 1002(5) would continue to play an important role in those

instances where Congress looked to FLSA, but not in those instances where Congress did not rely on FLSA. As for Judge Shadur's view of corporate veils, the *Starrett* court remarked that piercing that veil under state or federal common law was entirely consistent with the language of § 1145, since the owner in that instance would be the corporation for purposes of ERISA, and obligated under the state or federal law of contracts to pay a benefit plan. *Starrett,* 845 F.2d at 25-26.

This court is mindful of its duty to give proper deference to the opinions of those who sit in this same district. This court has considered the views of Judges Shadur, Grady, and Moran in *Gambino, Bakke,* and *Serembus* v. *Comfort Lines, Inc.,* 689 F.Supp. 1496 (N.D. Ill. 1988), respectively, and finds that they are not as convincing as that expressed in *Starrett.* The cases from this district rely on precedents that have been overruled or narrowed, and they have not considered the legislative history of § 1145 as described in *Starrett.* This court does not share Judge Shadur's concern that a refusal to incorporate FLSA's standard of employer liability in § 1145 will render it and §1002(5) of ERISA nullities. In light of this and the unanimous opinions of those Courts of Appeals that have decided the issue presented here to the contrary of the decisions in *Gambino, Bakke,* and *Serembus,* this court holds that unless there are grounds to pierce the corporate veil or the corporation is the alter ego of the controlling individual, that individual is not liable under § 1145 unless he or she is a party to the plan or collective bargaining agreement. Because the plaintiffs here have not alleged that Rob Roy's corporate veil warrants piercing, this court must dismiss Count 1 of the Complaint for failure to state a claim upon which this court can grant relief.

This court now turns to Count 2. The Niedrichs contend that the plaintiffs cannot sue them in this court under

§ 301(a) of LMRA because the Niedrichs were not parties to Rob Roy's collective bargaining agreement. In *Loss* v. *Blakenship,* 673 F.2d 942, 946-48 (7th Cir. 1982), the court affirmed the general principle that persons who are not parties to a collective bargaining agreement cannot be sued under the LMRA. The only exception that the court recognized to this rule was for "suits against one owing a 'fiduciary duty' to the plaintiff." *Id.* at 948, quoting *Nedd* v. *United Mine Workers of America,* 556 F.2d 190, 198 n.13 (3d Cir. 1977). The plaintiffs do not contest *Loss,* nor have they alleged in their complaint that the Niedrichs owed them a fiduciary duty. They make one suggestion in their Brief in Response to Defendants' Motion to Dismiss that since the Niedrichs are employers for purposes of ERISA, they should be amenable to suit under the LMRA. The plaintiffs cite no authority for this proposition, however, nor do they present any reason as to why this court should broaden the holding of *Loss.* For this reason, this court must dismiss Count 2 for want of jurisdiction.

In summary, this court grants the Niedrichs' motion to dismiss Count 1 of the Complaint for failure to state a claim, and grants their motion to dismiss Count 2 for lack of jurisdiction.

ENTER:

/s/ BRIAN BARNETT DUFF
Brian Barnett Duff, Judge
United States District Court

DATE: December 5, 1988

Pension Benefit Guaranty Corporation

82-38

December 14, 1982

OPINION:

This responds to your letter raising the question of whether officers or shareholders may be held liable for a corporation's liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.

In your letter, and in a subsequent telephone conversation with *** of this office, you indicated that your company had made contributions into the Local ***. *** Pension and Trust Fund until about a year ago. You also indicated that your company filed a Chapter 11 Bankruptcy petition in 1970, that in November 1981 the company's plan of arrangement was confirmed and that at that time, "union officials accepted a 10% repayment on approximately a $20,000 balance owed to the pension fund." Now you have received a letter from the "union" stating that *** has incurred withdrawal liability in the amount of $210,000. You are concerned as to how this amount was reaching and as to whether you or other principals can be held personally liable.

Under ERISA, any employer that completely or partially withdraws from a multiemployer plan must pay its share of the plan's unfunded liability. The exact amount of this contingent liability is determined under ERISA Section 4211.

Under ERISA, the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan. If the plan sponsor makes such a determination, and if the employer objects,

the matter must then be resolved through the dispute resolution procedures described in Sections 4219 and 4221 of ERISA.

With regard to your question as to individual shareholder responsibility for withdrawal liability, we note that ERISA has no special rules regarding shareholder or officer liability. Accordingly, this issue is usually determined by State law, which generally provides that shareholders are not liable for the debts of a corporation. You should, however, be aware that the laws of every state contain exceptions to this general principle.

If you have any questions on this matter, please contact *** of this office at (202) 254-4895.

Henry Rose

General Counsel